UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 21

Docket No. AT-0752-09-0408-I-1
AT-0752-09-0484-I-1

Gary Donnell Rhett,

Appellant,

v.

United States Postal Service,

Agency.

January 27, 2010

David H. Brown, Jacksonville, Florida, for the appellant.

Gillian Steinhauer, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of two initial decisions that dismissed his removal appeals for lack of adverse action jurisdiction. For the reasons set forth below, we JOIN the appeals under 5 C.F.R. § 1201.36, DENY the petitions for review because they do not meet the criteria for review set forth at 5 C.F.R. § 1201.115(d), REOPEN the appeals on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decisions AS MODIFIED by this Opinion and Order, still DISMISSING the appeals for lack of adverse action jurisdiction.

BACKGROUND

¶2 Effective September 5, 2008, the agency removed the appellant from his Mail Processing Clerk position based on alleged attendance-related misconduct. Initial Appeal File, MSPB Docket No. AT-0752-09-0408-I-1 (IAF 408), Tab 5, Subtab 4G. The appellant, through his union representative, filed a grievance concerning his removal. *Id.*, Subtab 4C While the grievance was pending at Step Two of the negotiated grievance procedure, the parties entered into a November 20, 2008 last-chance settlement agreement pursuant to which, inter alia, the appellant returned to work and, as discussed in more detail below, agreed to refrain from further attendance-related misconduct for a period of eighteen months. *Id.*, Subtab 4A.

¶3 By notice dated March 4, 2009, the agency informed the appellant that it would remove him from his position effective March 20, 2009, based on his alleged breach of the last-chance settlement agreement. IAF 408, Tab 1 at 17-23. At that point, the appellant filed an appeal of the September 5, 2008 removal and contended that the last-chance settlement agreement was invalid and that the agency had violated his statutory procedural rights in effecting the removal. IAF 408, Tab 1. He requested a hearing, *id.* at 1, but later withdrew his hearing request and sought an initial decision on the written record. IAF 408, Tab 14.

¶4 After the March 20, 2009 removal became effective, the appellant filed a second appeal in which he contested the March 20, 2009 removal. Initial Appeal File, MSPB Docket No. AT-0752-09-0484-I-1 (IAF 484), Tab 1. As in his first appeal, he initially requested a hearing, *id.* at 2, but later withdrew his request for a hearing, IAF 484, Tab 9 at 1.

¶5 The administrative judge (AJ) adjudicated the two appeals separately and dismissed them both for lack of adverse action jurisdiction. As to the first appeal, the AJ considered and rejected the appellant's arguments that the last-chance settlement agreement was invalid and found that he could not appeal the first removal because he had settled it without expressly reserving his right to

file a Board appeal of the action. Initial Decision, MSPB Docket No. AT-0752-09-0408-I-1 (ID 408) at 1-3. As to the second appeal, the AJ again found that the last-chance settlement agreement was valid and enforceable, the appellant breached the agreement when he was absent from work on five occasions, and the appellant could not appeal the second removal to the Board because he had waived his appeal rights in the last-chance settlement agreement. Initial Decision, MSPB Docket No. AT-0752-09-0484-I-1 (ID 484) at 1-4.

¶6 The appellant petitions for review of both initial decisions. Petition for Review File, MSPB Docket No. AT-0752-09-0408-I-1 (PFR File 408), Tab 1; Petition for Review File, MSPB Docket No. AT-0752-09-0484-I-1 (PFR File 484), Tab 1. The agency responds in opposition to both petitions for review. PFR File 408, Tab 4; PFR File 484, Tab 3.

ANALYSIS

¶7 As a preliminary matter, we find it appropriate to join these appeals for adjudication. Joinder of two or more appeals filed by the same appellant may be appropriate when joinder would expedite processing of the appeals and when joinder would not adversely affect the interests of the parties. *Boechler v. Department of the Interior*, 109 M.S.P.R. 542, ¶ 14 (2008), *aff'd*, 328 F. App'x 660 (Fed. Cir. 2009); 5 C.F.R. § 1201.36(a)(2), (b). We find that these appeals meet the regulatory criteria for joinder, and we join them.

¶8 When an employee chooses to file and settle a grievance by agreeing to lesser discipline, that course of action is presumptively voluntary and therefore divests the Board of jurisdiction over the underlying matter. *Swink v. U.S. Postal Service*, 111 M.S.P.R. 620, ¶ 9 (2009); *Perry v. U.S. Postal Service*, 78 M.S.P.R. 272, 276 (1997). However, the Board will review the terms of a settlement agreement and the surrounding circumstances to determine if it retains jurisdiction over an appeal of an action that was settled in another procedural avenue. *Swink*, 111 M.S.P.R. 620, ¶ 9; *Perry*, 78 M.S.P.R. at 276. A

presumption exists that Board appeal rights are waived when the other procedural avenue is a grievance and the settlement of that grievance does not specifically reserve the right to file a Board appeal. *Hanna v. U.S. Postal Service*, 101 M.S.P.R. 461, ¶ 8 (2006); *Laity v. Department of Veterans Affairs*, 61 M.S.P.R. 256, 261-62 (1994).

¶9 The agreement here provides:

> All parties agree with this resolution and waive further appeal of this action and any other action caused by the violation of any of the above [provisions] for a period not to exceed eighteen months. The waiver of appeal rights includes, but is not limited to, those under the Merit Systems Protection Board (MSPB); the grievance-arbitration procedures; the National Labor Relations Board (NLRB); and EEO Forums; Federal and Civil Courts.

IAF (408), Tab 5, Subtab 4A at 3. The above language indicates that the appellant clearly waived his right to file a Board appeal of the September 5, 2008 removal action. *See Mays v. U.S. Postal Service*, 995 F.2d 1056, 1059 (Fed. Cir. 1993); *Laity*, 61 M.S.P.R. at 263. Similarly, nothing in the last-chance settlement agreement expressly preserved the appellant's right to appeal the September 5, 2008 removal to the Board. *See Perry*, 78 M.S.P.R. at 277.

¶10 Further, we agree with the administrative judge's determination that the appellant failed to show that his acceptance of the last-chance settlement agreement was invalid. ID 408 at 2-3. The appellant correctly asserted below that the agency failed to inform him in connection with the September 5, 2008 removal that, as a preference-eligible employee, he had the right to appeal his removal to the Board. IAF 408, Tab 1 at 2, Tab 5, Subtab 4G. The appellant argued that, because he was not aware that he had Board appeal rights, his waiver of those rights in the last-chance settlement agreement was not knowing and voluntary. IAF 408, Tab 10 at 4-5; PFR File 408, Tab 1 at 5-8.

¶11 The record reflects that the basis of the grievance that the union filed on the appellant's behalf was, inter alia, that the appellant was a preference-eligible veteran entitled to adverse action procedures. IAF 408, Tab 5, Subtab 4C at 53.

Therefore, it is clear that the appellant's union representative in the grievance proceeding was aware that the appellant had Board appeal rights. Moreover, the last-chance settlement agreement itself clearly mentions Board appeal rights in two places on the signature page, including the following statement:

> I, [the appellant], have read and understand the conditions and restrictions set forth in the above agreement. I am mentally and physically fit so as to be able to understand this agreement in its entirety. I know and understand that I may have appeal rights to the Merit Systems Protection Board, the grievance-arbitration procedure, NLRB, and EEO with respect to any removal action taken against me.

IAF 408, Tab 5, Subtab 4A at 3. The appellant and his union representative signed and dated this specific statement in addition to signing the remainder of the agreement. *Id.* If the appellant did not understand the statement, he could have requested clarification, but he does not claim that he did so. Thus, we find that the appellant knew or should have known that he may have had Board appeal rights at the time he entered into the agreement. Therefore, his claims that the last-chance settlement agreement is invalid because he entered into it "with blinders on," PFR File 408, Tab 1 at 5, and that the agency fraudulently concealed his rights from him, *id.* at 5-6, are not supported by the record evidence. *Cf. Perry*, 78 M.S.P.R. at 278 (it is immaterial whether the agency's failure to inform the appellant of a Board appeal right at the time it imposed the action under appeal caused him to be unaware of his appeal rights when he entered into the settlement agreement, assuming he did not know of a Board appeal right when he entered into the agreement).

¶12 The last-chance settlement agreement did not expressly preserve the appellant's right to file a Board appeal over his September 5, 2008 removal and the appellant has not shown that it is invalid or otherwise should not be enforced. Moreover, the appellant ratified the agreement and accepted the fruits of the agreement by returning to work in accordance with its provisions. *See Mays*, 995 F.2d at 1059. Consequently, the administrative judge correctly found that the

appellant failed to show that the Board has adverse action jurisdiction over the September 5, 2008 removal. ID 408 at 2-3.

¶13 As to the appellant's removal effective March 20, 2009, the Board lacks jurisdiction over an action taken pursuant to a last-chance settlement agreement in which an appellant waives his right to appeal to the Board. *Willis v. Department of Defense*, 105 M.S.P.R. 466, ¶ 17 (2007). To establish that a waiver of appeal rights in a last-chance settlement agreement should not be enforced, an appellant must show one of the following: (1) He complied with the last-chance settlement agreement; (2) the agency materially breached the agreement or acted in bad faith; (3) he did not voluntarily enter into the agreement; or (4) the last-chance settlement agreement resulted from fraud or mutual mistake. *Id.*; *Covington v. Department of the Army*, 85 M.S.P.R. 612, ¶ 12 (2000). Where an appellant raises a nonfrivolous factual issue of compliance with a settlement agreement, the Board must resolve that issue before addressing the scope of and applicability of a waiver of appeal rights in the settlement agreement. *Stewart v. U.S. Postal Service*, 926 F.2d 1146, 1148 (Fed. Cir. 1991); *Covington*, 85 M.S.P.R. 612, ¶ 12.

¶14 The appellant contends here that he did not breach the agreement. He further alleges that the agreement is invalid because he was unaware that he had Board appeal rights at the time he entered into it. IAF 484, Tab 5. As noted above, however, the evidence shows that the appellant knew or should have known that he had Board appeal rights when he entered into the last-chance settlement agreement, and he has failed to show that the agreement is invalid.

¶15 The last-chance settlement agreement provides:

> Absences, other than those documented as [covered under the Family and Medical Leave Act of 1993], constituting more than two (2) frequencies (occasions) within a period of time not to exceed 90 days or whenever the employee utilizes the frequencies, whichever comes first, will result in immediate removal. If the frequencies occur in a period of time less than 90 days, removal may be effected

> without waiting 90 days. [The appellant] understands and agrees that such removal will be without appeal in any form or forum. . . .
>
> [The appellant] understands that even though he is required to furnish satisfactory documentation for his absences, they are still considered absences under this agreement and are counted regardless of whether the leave is charged to leave without pay, annual leave, sick leave, failure to work overtime, short clock rings, or failure to work a holiday.

IAF 484, Tab 4, Subtab 4Q at 2, ¶¶ 9A, 9C.

¶16 There is no dispute that the appellant was not eligible for leave under the Family and Medical Leave Act of 1993 because he had not worked a sufficient number of hours in the prior year. There is also no dispute that the appellant incurred two unscheduled absences when he did not report for work on December 12 and December 19, 2008, and he was required to maintain perfect attendance thereafter until February 19, 2009. ID 484 at 3. The agency alleged that the appellant violated the last-chance settlement agreement when he incurred unscheduled absences on February 1-2, 2009, and February 5-7, 2009. IAF 484, Tab 4, Subtab 4A at 5, Subtab 4B at 2. The administrative judge found that the appellant incurred the charged unscheduled absences and thus breached the agreement. ID 484 at 3. The appellant has not challenged this finding on review and we see no reason to disturb it.

¶17 The appellant has not shown that he complied with the last-chance settlement agreement or that it is invalid. Therefore, we must next address the scope and applicability of the waiver of appeal rights in the agreement. *See Stewart*, 926 F.2d at 1148; *Covington*, 85 M.S.P.R. 612, ¶ 12. As noted above, the last-chance settlement agreement provided:

> All parties agree with this resolution and waive further appeal of this action and any other action caused by the violation of any of the above [provisions] for a period not to exceed eighteen months. The waiver of appeal rights includes, but is not limited to, those under the Merit Systems Protection Board (MSPB). . . .

IAF 484, Tab 4, Subtab 4Q at 3. The last-chance settlement agreement further provided:

> I, [the appellant], have read and understand the conditions and restrictions set forth in the above agreement. I am mentally and physically fit so as to be able to understand this agreement in its entirety. . . . I know and understand that I have waived my appeal rights through any and all forums and avenues, including, but not limited to, the Merit Systems Protection Board, . . . for any removal action initiated against me for violation of this last chance agreement during this two-year period.

Id. We find that this language constitutes a clear and unequivocal waiver of the appellant's right to appeal the March 20, 2009 removal to the Board. *See Covington*, 85 M.S.P.R. 612, ¶ 16; *Merriweather v. Department of Transportation*, 59 M.S.P.R. 434, 437 (1993). Because, for the reasons noted above, the appellant has not shown that this waiver is unenforceable, the Board lacks jurisdiction over his appeal of the March 20, 2009 removal, and the administrative judge correctly dismissed it for lack of adverse action jurisdiction. ID 484 at 3-4.

ORDER

¶18 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.